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Attorneys for Plaintiffs James Davis Bennett and Pamela Bennett

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

JAMES DAVIS BENNETT, **PAMELA BENNETT**

Plaintiffs,

– v –

UNITED STATES OF AMERICA,

Defendants.

No. 15-cv-01923-RGK-E

[Hon. R. Gary Klausner]

PLAINTIFFS’ NOTICE OF MOTION AND MOTION TO DISMISS WITHOUT PREJUDICE FTCA CLAIMS OVERLAPPING WITH *BIVENS* CLAIMS IN NO. 2:14-CV-4697

DATE: April 25, 2016
TIME: 9:00 A.M.
PLACE: Roybal Courthouse
Room 850

PLEASE TAKE NOTICE that on Monday, April 25, 2016, at 9:30 a.m. in Courtroom 850 of the United States Courthouse, 255 East Temple Street, Los Angeles, California 90012, Plaintiffs James Davis Bennett and Pamela Bennett will move the Court to dismiss without prejudice all claims in this action which arise out of the same facts and circumstances underlying Plaintiff James Davis Bennett's *Bivens* claims in the related matter of *James Davis Bennett v. Jaspal Dhaliwal et al.*, No. 2:14-cv-4697, presently pending on appeal in the Ninth Circuit, No. 15-56448.

Pursuant to Local Rule 7-3, counsel for Plaintiffs conferred with counsel for Defendant United States on April 6, 2016, April 7, 2016 and April 8, 2016. Defendant does not consent to the relief requested in this motion.

By virtue of the stipulated *Ex Parte* filed simultaneously with this submission, the parties have agreed to shorten the time necessary for the meet-and-confer process under Local Rule 7-3, and have agreed to shorten the time for briefing to allow for a hearing on April 25, 2016, the same date scheduled for a final pretrial conference in this matter.

Plaintiffs' motion is based on the attached Memorandum of Points and Authorities, all pleadings and papers on file in this action, and such other evidence and argument as may be presented on behalf of Plaintiffs at the hearing on this motion

Dated: April 11, 2016

Respectfully submitted,

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Plaintiffs James Davis Bennett and Pamela Bennett respectfully move the Court for an Order under Fed. R. Civ. P. 41(a)(2) dismissing, without prejudice, their claims under the Federal Tort Claims Act related to events at FCI Lompoc, which arise out of the same facts and circumstances underlying Mr. Bennett's *Bivens* claims, and which are now the subject of an appeal in the Ninth Circuit, *Bennett v. Dhaliwal et al.*, No. 15-56448. Mr. and Mrs. Bennett seek such an Order so as to exercise their recognized right to elect remedies. Specifically, with respect to the FCI Lompoc litigation, Mr. and Mrs. Bennett have chosen to forego their claims under the Federal Tort Claims Act and to proceed only with the *Bivens* claims (in the event the Ninth Circuit does not affirm this Court's summary judgment ruling and remands the claims for trial). Mr. and Mrs. Bennett seek a ruling allowing dismissal without prejudice because the alternative—a dismissal with prejudice—may constitute a judgment bar under 28 U.S.C. §2676 and preclude Mr. Bennett from litigating the *Bivens* claims, even if the Ninth Circuit were to remand the claims for trial.

Defendant United States does not oppose dismissal of the FTCA claims concerning events at Lompoc, but takes the position that the dismissal should be with prejudice. Defendant insists on this result because it seeks exactly what Mr. and Mrs. Bennett wish to avoid: a judgment bar which would moot the *Bivens* appeal. Under the applicable law, and in the facts and circumstances of this case, Defendant's demand is not proper. To the contrary, Defendant cannot show the necessary *legal* prejudice which would justify opposing the type of dismissal Mr. and Mrs. Bennett request. Accordingly, in light of courts' recognition that plaintiffs in the position of Mr. and Mrs. Bennett maintain the ability to elect their remedies even up to the eve of trial and, significantly, in light of the fact that Mr. and Mrs. Bennett have chosen to dismiss their claims with the very real risk that affirmance of this Court's summary judgment ruling would extinguish *any and all* remedies related to the events at FCI Lompoc, the requested dismissal without prejudice is appropriate. The motion should be granted.

II. FACTUAL AND PROCEDURAL BACKGROUND

This action ("FTCA case") and the related action, *Bennett v. Dhaliwal et al.*, No. 2:14-cv-4697 ("*Bivens* case"), involve the failures of multiple employees of Defendant United States of America to ensure that Plaintiff James Davis Bennett was provided appropriate care for a serious medical condition while he was incarcerated in two Federal Bureau of Prisons ("BOP") facilities, FCI Safford in Safford, Arizona ("Safford") and the satellite camp at FCI Lompoc in Lompoc, California ("Lompoc"). The *Bivens* case was filed first. In that action, Mr. Bennett claimed that five medical providers at Lompoc violated his Eighth Amendment rights through their deliberate indifference to his serious spinal condition which was later diagnosed as Pott's disease—tuberculosis of the spine.

The FTCA case was filed after the *Bivens* case,[1] and involves a broader scope of claims. A portion of the claims in the FTCA case involve events at Safford where, among other things, medical staff failed to diagnose and treat an inmate who, for months, presented with obvious signs and symptoms of active tuberculosis causing Mr. Bennett to be exposed to tuberculosis, which led to his eventual development of Pott's disease. Other claims asserted in the FTCA case involve the same events at issue in the *Bivens* case and seek relief for the negligent medical care provided by medical staff at Lompoc.

On September 22, 2015, this Court granted summary judgment as to all Mr. Bennett's *Bivens* claims. *Bivens* Case Dkt. 63. Mr. Bennett appealed from the Court's order. Mr. Bennett filed his opening brief on February 29, 2016 and the Defendants' brief is due on April 29, 2016. After filing the appeal, Mr. and Mrs. Bennett moved this

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[1] Though filed at different times due to the *Bivens* statute of limitations and FTCA exhaustion requirements, the parties have viewed the cases as concurrent litigation. *See, e.g.*, Rule 26(f) Joint Report, *Bivens* Case Dkt. 22 at 2.

Court to stay summary judgment and trial in this matter due to the impact the FTCA's judgment bar, 28 U.S.C. §2676, would have on Mr. Bennett's ability to litigate his *Bivens* claims. FTCA Case Dkt. 32. The Court denied that motion on November 12, 2015. FTCA Case Dkt. 36. On December 3, 2015, Mr. and Mrs. Bennett filed a Petition for Writ of Mandamus requesting a stay of summary judgment and trial in this matter so as to preserve Mr. Bennett's ability to pursue the *Bivens* appeal to its conclusion as any judgment on the merits on the Lompoc-related FTCA claims would, by virtue of the judgment bar statute, preclude further litigation of the *Bivens* claims. *Bennett et al. v. U.S. Dist. Ct. for the Central Dist. of Cal.*, No. 15-73658. The Ninth Circuit denied the petition on April 6, 2016.

While the Petition for Writ of Mandamus was pending in the Ninth Circuit, the United States filed a motion for partial summary judgment in the instant FTCA case. In large part, the motion did not address the Lompoc-related FTCA claims asserted in Counts VI, VII and VIII of the FTCA Complaint. Thus, although the motion for partial summary judgment is still pending, whatever the outcome of that motion, the Lompoc-related claims will be left for trial, which is scheduled to commence on May 10, 2016.

Mr. and Mrs. Bennett are thus left with two choices: either (1) proceed to trial on the Lompoc-related FTCA claims and obtain a judgment which will likely moot the *Bivens* appeal and, in any event, preclude Mr. Bennett from taking the *Bivens* claims to trial, or (2) dismiss the FTCA claims, pursue the *Bivens* appeal, and, in the event of success on the appeal, present those claims to a jury. Plaintiffs litigating civil rights claims against federal government officers are, in advance of trial, frequently faced with similar choices, and courts recognize that this choice is an integral part of the Congressionally created remedial scheme allowing for an election of remedies. *See Manning v. United States*, 546 F.3d 430, 435 (7th Cir. 2008); *Engel v. Mecke*, 24 F.3d 133, 135 (10th Cir. 1994); *Van Beek v. Robinson*, No. 11-10514, 2013 WL 2446121, at *3-4 (E.D. Mich. June 5, 2013); *Ortiz v. Pearson*, 88 F. Supp. 2d 151, 165-66 (S.D.N.Y.

2000). Mr. and Mrs. Bennett are prepared to make their election and have decided to pursue Mr. Bennett's *Bivens* remedy. Accordingly, in order to effectuate that election, they seek dismissal of their Lompoc-related FTCA claims without prejudice under Fed. R. Civ. P. 41(a)(2).

III. ARGUMENT

A. Dismissal Without Prejudice Is Necessary To Effectuate Plaintiffs' Election Of Remedies.

By pursuing two sets of claims, Mr. Bennett has followed the long-established principle that *Bivens* and FTCA remedies are "complementary causes of action," *Carlson v. Green*, 446 U.S. 14, 20 (1980). In light of the judgment bar, 28 U.S.C. §2676, plaintiffs like Mr. and Mrs. Bennett are conscious that, when pursuing both *Bivens* and FTCA causes of action, they must "make strategic choices in pursuing the remedies," such as, for example, proceeding to judgment on a successful *Bivens* claim and then electing to "voluntarily withdraw a contemporaneous FTCA claim." *Manning v. United States*, 546 F.3d 430, 435 (7th Cir. 2008). The key for plaintiffs in such cases is the element of choice. *See Engel v. Mecke*, 24 F.3d 133, 135 (10th Cir. 1994) (noting that "plaintiff may elect initially to bring his action against either" United States or individual defendants or both); *Ortiz v. Pearson*, 88 F. Supp. 2d 151, 165-66 (S.D.N.Y. 2000) (quoting *Hernandez v. Lattimore*, 612 F.2d 61, 67 (2d Cir. 1979)) ("[A] plaintiff may *commence* an action containing both *Bivens* and FTCA claims because the 'two remedies do not stand in pari materia.'"). As part of that choice, plaintiffs must have the opportunity to fully evaluate both causes of action through discovery and dispositive motions. Thus, election decisions are typically made prior to trial—or even after a *Bivens* claim is tried to a jury. *See Engle*, 24 F.3d at 135 (discussing bifurcation of claims at trial and allowing *Bivens* claims to be tried to a jury first); *Ortiz*, 88 F. Supp. 2d at 166-67 (same). Accordingly, even at the summary judgment stage, "there is no compelling reason to force plaintiff to make that choice" between remedies. *Ortiz*, 88 F.

Supp. 2d at 166. "Nor is there any sound basis for the Court to require that the FTCA claim be tried first." *Id.*

A necessary corollary to the right to elect a remedy is that courts must permit plaintiffs to effectuate their election by dismissing the claims they elect not to pursue. The decision in *Van Beek v. Robinson*, No. 11-10514, 2013 WL 2446121 (E.D. Mich. June 5, 2013), is illustrative. In that case, the plaintiff alleged that U.S. Customs and Border Protection agents conducted an invasive and unlawful strip search when she entered the United States from Canada; she brought *Bivens* claims against the agents and FTCA claims against the United States. *Id.* at *1. The court scheduled a bifurcated jury trial on the *Bivens* claims and a bench trial on the FTCA claims. *Id.* Six days before trial, the court postponed the trial due to a medical emergency for one of the agent defendants. *Id.* One day later—that is, five days before the originally scheduled trial date—the plaintiff moved under Fed. R. Civ. P. 41(a)(2) to dismiss her FTCA claims without prejudice. *Id.*

In considering the motion, the court noted that the nature of the dismissal—*without* prejudice versus *with* prejudice—was potentially critical as some courts have "considered a dismissal of FTCA claims with prejudice to constitute a final judgment, thus invoking application of the FTCA's judgment bar." *Id.* at *4 (citing *Farmer v. Perrill*, 275 F.3d 958, 962 (10th Cir. 2001)).[2] In response to the plaintiff's motion, the United States insisted, as it does here, that the dismissal should be *with* prejudice, thereby implicating the judgment bar. The court rejected that request. It concluded that the United States' "argument ignores a vital aspect of the judgment bar." *Id.* at *3. Noting that the FTCA judgment bar "imposes an election of remedies," the court concluded that the plaintiff's request for dismissal was the natural and necessary procedural step to accomplish that election. *Id.* (quoting *Harris v. United States*, 422 F.3d 322, 337 (6th Cir. 2005); *Ting v. United States*, 927 F.2d 1504, 1513 n.10 (9th Cir. 1991)) (additional quotations omitted). The plaintiff, the court ruled, had done everything that was expected of her to accomplish the necessary election:

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[2] The Ninth Circuit appears not to have addressed this issue, and a judgment bar case currently pending before the Supreme Court, *Simmons v. Himmelreich*, S. Ct. No. 15-109, may shed further light on the question. Without definitively conceding the point, Mr. and Mrs. Bennett assume for the sake of the argument in this motion that a dismissal with prejudice would implicate the judgment bar.

> Plaintiff has now clearly made that "election" by filing the instant Motion, which, importantly, is brought prior to pursuing her FTCA claims to a final judgment. To foreclose Plaintiff from making this election would surely contravene Congress' intention to allow a plaintiff to pursue *Bivens* claims against the individual agents and FTCA claims against the United States in the same case.

Id. (citing *Carlson*, 446 U.S. at 20). Any contrary result, including dismissing the claims with prejudice as requested by the United States, would, the court noted, "result in application of the judgment bar and could thereby preclude Plaintiff from further litigating her *Bivens* claim," a consequence that would "produce an absurd result." *Id.* at *4. Accordingly, the court granted the plaintiff's request to dismiss the FTCA claims without prejudice pursuant to Fed. R. Civ. P. 41(a)(2). *Id.*; *see also Maxwell v. Dodd*, No. 08-11326, 2009 WL 3805597 at *3-4 (E.D. Mich. Nov. 12, 2009) (rejecting United States' request to convert previous dismissal without prejudice to dismissal with prejudice as "entry of 'judgment' on claims that Plaintiffs chose not to pursue would effectively nullify Plaintiffs' ability to choose between FTCA and *Bivens* claims").

In this case, Mr. and Mrs. Bennett are requesting the exact same order that the *Van Beek* court found would be "absurd" not to grant. Because they are merely exercising their recognized right to elect remedies, dismissal of their Lompoc-related FTCA claims is appropriate.

B. Defendant Cannot Demonstrate Any Legal Prejudice To Justify Denial Of Plaintiffs' Requested Dismissal.

Mr. and Mrs. Bennett's request is made under Fed. R. Civ. P. 41(a)(2). "The purpose of the rule is to permit a plaintiff to dismiss an action without prejudice so long as the defendant will not be prejudiced, or unfairly affected by dismissal." *Stevedoring Services of America v. Armilla Intern. B.V.*, 889 F.2d 919, 921 (9th Cir. 1989). If a defendant opposes a dismissal without prejudice, "the district court must determine whether the defendant will suffer some plain legal prejudice as a result of the dismissal." *Westlands Water Dist. v. United States*, 100 F.3d 94, 96 (9th Cir. 1996); *see also Smith v. Lenches*, 263 F.3d 972, 975 (9th Cir. 2001) ("A district court should grant a motion for voluntary dismissal…unless a defendant can show that it will suffer some plain legal prejudice as a result.").

Legal prejudice sufficient to refuse a dismissal without prejudice is narrowly defined. Importantly, "the threat of future litigation which causes uncertainty is insufficient to establish plain legal prejudice." *Westlands Water Dist.*, 100 F.3d at 96. Nor is the fact that a defendant has spent time and resources defending against an action which the plaintiff seeks to dismiss without prejudice sufficient to deny that request. The Ninth Circuit has "explicitly stated that the expense incurred in defending against a lawsuit does not amount to legal prejudice." *Id.* at 97 (citing *Hamilton v. Firestone Tire & Rubber Co.*, 679 F.2d 143, 145 (9th Cir. 1982)). "[P]lain legal prejudice does not result merely because the defendant will be inconvenienced by having to defend in another forum or where a plaintiff would gain a tactical advantage by that dismissal." *Smith*, 263 F.3d at 976 (citing *Hamilton*, 679 F.2d at 145); *see also WPP Luxembourg Gamma Three Sarl v. Spot Runner, Inc.*, 655 F.3d 1039, 1059 n.6 (9th Cir. 2001) (affirming the district court's dismissal without prejudice because, "[h]ere, the only prejudice that the Defendant[s] claim is the risk of having to defend this action again"); *Edstrom v. NDEX West, LLC*, No. Civ. S-10-0105-KJM-CKD, 2012 WL 4092420, at *2 (E.D. Cal. Sept. 17, 2012) ("Here, defendant has failed to show it will suffer 'plain legal prejudice' as a result of dismissal. The fact that a voluntary dismissal will moot defendant's motion for summary judgment in itself is not legal prejudice.").

As the Ninth Circuit has explained, "legal prejudice is just that—prejudice to some legal interest, some legal claim, some legal argument." *Westlands Water Dist.*, 100 F.3d at 97. Examples of such prejudice include "the loss of a federal forum, or the right to a jury trial, or a statute-of-limitations defense." In this case, the United States cannot claim any such loss. The impact of dismissal without prejudice is straightforward: the FTCA claims will be dismissed without prejudice, Mr. Bennett will proceed with his *Bivens* appeal, and, if successful, return to this Court for a jury trial. The fact that the *Bivens* defendants may have to defend against claims arising out of similar facts to those underlying claims which Mr. and Mrs. Bennett seek to dismiss is irrelevant as the "risk of having to defend this action again" is *not* plain legal prejudice. *WPP Luxembourg Gamma Three Sarl*, 655 F.3d at 1059 n.6. Finally, should Mr. Bennett not prevail on his *Bivens* claims, there will be no risk to the United States that the Lompoc-related FTCA claims will be reinstated, as the statute of limitations has expired. *See Humphreys v. United States*, 272 F.2d 411, 412 (9th Cir. 1959) (holding that statute of limitations barred FTCA suit because claims had been dismissed without prejudice and "a suit dismissed without prejudice pursuant to Rule 41(a)(2) leaves the situation the same as if the suit had never been brought in the first place"); *see also City of South Pasadena v. Mineta*, 284 F.3d 1154, 1157 (9th Cir. 2001) (citing *Humphreys*, 272 F.2d at 412).

The only "loss" the United States will experience is the loss of the ability to wield the judgment bar as a defense against Mr. Bennett's *Bivens* claims. But any argument to that effect would be a grave mischaracterization of the judgment bar. That provision is not a "weapon" to be maintained by the United States. On the contrary it is the statutory mechanism giving rise to the need for a plaintiff to elect a remedy. Accordingly, the mere fact that Mr. and Mrs. Bennett are compelled to file this motion effectuates the purpose and intent of the judgment bar. Any argument that the United States can be the sole determinant as to how the judgment bar should be used and that it can force Mr. and Mrs. Bennett to try claims that they do not wish to try is, as defined by the *Van Beek* court, "absurd." *Van Beek*, 2013 WL 2446121, at *4.

It should also be noted that if any party will suffer legal prejudice as a result of the *requested dismissal, it will be Mr. and Mrs. Bennett*. In the standard case, including those cited above, a *Bivens*/FTCA plaintiff makes an election prior to trial when both remedies are available and a trial on the elected remedy is a certainty. In this case, however, due to the vagaries of scheduling which resulted in the granting of summary judgment in the *Bivens* case before discovery had even started in the FTCA case, there is no such certainty for Mr. and Mrs. Bennett. Upon dismissal of the Lompoc-related FTCA claims, there remains the possibility that the Ninth Circuit will affirm this Court's summary judgment ruling. Should that happen, it will be Mr. and Mrs. Bennett who have been legally prejudiced as they will have forever lost the opportunity to seek compensation for the harms they claim were caused by the misconduct of Lompoc medical staff.[3] Mr. and Mrs. Bennett, however, after due consideration of the distinctions between the *Bivens* and FTCA remedies, including a broader scope of damages and a right to a jury trial with respect to the *Bivens* claims, have determined that they are willing to accept that risk.

Indeed, it will be Plaintiffs who will be legally prejudiced if this Court does not grant **dismissal without prejudice**: Plaintiffs will lose the right to a trial by jury on the *Bivens* claim; Plaintiffs will lose the right to due process adjudication of the *Bivens* appeal; Plaintiffs will lose the right to punitive damages; and Plaintiffs damages would be much more circumscribed in an FTCA action (the reason defendant would want the FTCA and not the *Bivens* trial) due to the $250,000.00 dollar MICRA limit on pain and suffering under California law based on the FTCA, and an offset potentially for Veteran's Administrative care since Mr. Bennett is a Veteran, which would not apply in a *Bivens* action. For these reasons, where the law recognizes it is the Plaintiffs', not the defendant United States', right to elect, Plaintiff chooses to exercise his election rights. By definition, to dismiss with prejudice would deprive Plaintiffs of their right to elect as required by the law and contemplated by the FTCA regulatory scheme.

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[3] It was for this reason that Mr. and Mrs. Bennett filed a motion to stay the FTCA case in this Court and then a mandamus petition in the Ninth Circuit. They sought to avoid the stark choice they now face: either proceed with the FTCA claims and lose the ability to seek remand of the *Bivens* claims or dismiss the FTCA claims with the risk that the *Bivens* summary judgment ruling would be affirmed. This Court and the Ninth Circuit denied that relief, so now Mr. and Mrs. Bennett proceed to make the required decision.

Because the law requires that their election should be honored, this motion should be granted and their Lompoc-related FTCA claims should be dismissed without prejudice.

III. CONCLUSION

For the foregoing reasons Plaintiffs James Davis Bennett and Pamela Bennett respectfully request that the Court grant this Motion and dismiss without prejudice the Lompoc-related FTCA claims in Counts VI, VII and VIII of the Complaint.

Dated: April 11, 2016

Respectfully submitted,

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